TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 826. 2/2

WILLIAM LUCKING, APPELLANT,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 2, 1923.

(29,376)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1923.

1 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan. In Equity.

BILL OF COMPLAINT.

(Filed March 25, 1921.)

To the Honorable, the Judges of said Court:

Plaintiff herein, William Lucking, respectfully shows:

(1) That he is a citizen and resident of the city of Detroit, county of Wayne and state of Michigan, and is of full age.

(2) That defendant herein, Detroit & Cleveland Navigation Company, is a corporation organized and existing under and by virtue of the Laws of the State of Michigan and having its principal office and place of business for the administration of its affairs in said city of Detroit, Michigan.

That the purposes of defendant's corporation as contained in its Articles of Association are as follows:

"Article I.

This corporation is formed for the purpose of engaging in the business of maritime commerce or navigation within this state or upon the frontier lakes, natural or artificial, connected therewith, and for acquiring, owning, holding and disposing of every kind of real and personal property, or estate, whatsoever, which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

(3) That said defendant, Detroit & Cleveland Navigation Company, is now, and has been, for the last twenty years and more, during the navigation season, which includes the months of

2 May, June, July, August and September in each year, a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on Lake Huron and Lake Erie and connecting waters.

That in such capacity defendant has each season carried large numbers of passengers and great amounts of property and freight over well known and defined routes, such as: (*a*) Between Detroit in the state of Michigan and Buffalo in the state of New York; (*b*) between Detroit in the state of Michigan and Cleveland in the state of Ohio; (*c*) between Toledo, Ohio, and Detroit, Michigan, and thence through Lake Huron to and from various cities and ports in Michigan, such as Port Huron, Harbor Beach, Oscoda, Alpena, Mackinac Island and St. Ignace.

(4) That said defendant, Detroit & Cleveland Navigation Company, has, in the transportationa of said passengers and property

in the past, transacted business of an interstate character between ports on its route in the state of Michigan and ports on its routes in the states of New York and Ohio; and plaintiff is informed and believes that defendant intends to and will continue such interstate business in its capacity as a common carrier for hire, during the navigation season of the year 1921, and thereafter.

That said defendant owns and operates in its said business as a common carrier for hire several large steamers of the side-wheel type, notably the City of Detroit III, City of Cleveland III, Western States, Eastern States, City of Mackinac II, City of Alpena II, and other vessels.

(5) That in the conduct of its said business as a common carrier for hire, said defendant, has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers.

That plaintiff is informed and believes that such continuous carriage of passengers and shipment of property has been performed during several years and more last past by defendant in conjunction with other common carriers by railroad and includes business both of an interstate and intrastate character. That among said common carriers by rail are Miihigan Central Railroad Com-
3 pany, Pennsylvania Railroad Company, The Detroit, Toledo & Ironton Railroad Company, the New York Central Lines, the Pere Marquette Railroad Company, the Detroit & Mackinac Railroad Company, Duluth, South Shore & Atlantic Railroad Company, and many others.

That such continuous carriage of passengers and shipment of property is had and performed by defendant and said other common carriers by rail through and by means of joint tariffs, rates and arrangements duly and formally entered into in accordance with law, and regularly enforced and operated under.

That plaintiff is informed and believes that defendant intends to and will continue through the navigation season of the year 1921 and thereafter to carry on its said business as a common carrier for hire generally and to transport as a common carrier for hire passengers and property in such continuous carriage and under such joint tariffs, rates and arrangements, as aforesaid, and that defendant will derive a fair and reasonable return therefrom.

Plaintiff is informed and believes that it has been the custom for defendant for several years last past to file with the Interstate Commerce Commission on the day before the opening of its navigation season a supplement to its tariffs, announcing that said joint tariffs with said other common carriers by rail are in force; and to file with said commission the day after said navigation season closes a supplement to its joint tariffs suspending the same during the closed or winter season.

(6) And plaintiff shows that one of the most popular and largely traveled routes on the Great Lakes for years and years has been

defendant's regularly defined and well known route or course from cities or points in the state of Ohio, to-wit: Cleveland and Toledo, to and from and between points and cities in Michigan, such as Detroit on the Detroit River, Port Huron on the St. Clair River, Harbor Beach, Oscoda, Alpena, Cheboygan, Mackinac Island and St. Ignace on Lake Huron.

That defendant has continuously during a period of ten years and more last past maintained regular service by its said steamers over said routes, and has carried and transported as a common carrier for hire (in accordance with its various published tariffs and schedules, reference to which is hereby made) tens of thou-
4 sands of passengers and hundreds of thousands of tons of property and freight.

(7) Plaintiff is informed that in the conduct of its said business as a common carrier for hire, said defendant has made large profits on its capital investment therein, and has, in so doing, availed itself of the many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes, as aforesaid. And plaintiff further shows on information and belief, that if the operation by defendant of its steamers, City of Mackinac II, and City of Alpena II, has resulted in any loss, as plaintiff is informed defendant claims to be the case, that nevertheless defendant's business as a whole, from its operations on all its routes, has resulted, in the past, in a considerable net profit to it.

And in that connection the plaintiff shows and charges that defendant's business as a common carrier for hire during the year 1919 resulted in a net profit of over $1,100,000, which was over $600,000 more than its net profit for the year 1918; and further that from said net profit during 1919 defendant transferred to its surplus account over $600,000, which was an increase of about $500,000 over the amount transferred by it to surplus in 1918.

That said defendant paid dividends of 10 per cent in 1919 upon its capital stock outstanding amounting to about $4,900,000; and dividends thereon in 1918 of at least 8 per cent; and now has a large surplus on hand.

And plaintiff shows and charges upon information and belief that defendant has made a large net profit in the past from its transportation of passengers and freight over its said Detroit to Mackinac route.

(8) That continuously for several years and more and as plaintiff believes, twenty to thirty years, said defendant has maintained and operated the steamers City of Mackinac II and City of Alpena II, between points in Ohio, to-wit: Toledo to Detroit, Michigan, and thence northerly to and from said points and ports on Lake Huron.

That many of the said ports and cities on Lake Huron were developed and built up in part by and depend to a great extent on the services rendered by defendant's said steamers City of Mackinac II and City of Alpena II, during the navigation season of
5 each year, and transport therein large amounts of freight

and great numbers of passengers to and from points on said route in Lake Huron, and to and from points and ports on Lake Huron to and from points and ports on defendant's routes in Ohio and New York on Lake Erie, and to and from ports, cities and destinations on the lines of said different common carriers by railroad in such continuous carriage of passengers and shipment of property as aforesaid.

That large amounts of the products of the said ports, cities and small towns and surrounding territory on defendant's said route, familiarly known as the Detroit and Mackinac Route, such as manufactured articles of all kinds, automobiles, tractors, farm produce, and supplies of all kinds for summer residents and the like, are regularly from year to year during said navigation season, transported by defendant's said steamers, City of Mackinac II and City of Alpena II, which have maintained a regular service of four trips per week in each direction. That is, four departures from St. Ignace every week for Detroit and Toledo and way ports on defendant's said route, and four from Detroit and Toledo every week for St. Ignace and way ports.

(9) That plaintiff has in the past, and intends to in the future, become a passenger on said steamers of defendant running between Detroit and Mackinac Island, and has shipped property, such as household furniture and supplies for his summer residence, on said steamers and wishes and intends to do the same during the navigation season of said year 1921, and thereafter.

(10) That plaintiff has been informed and believes, because of an alleged dissatisfaction on the part of said defendant with some of the navigation laws of the United States, commonly referred to as the "Seaman's Act," that defendant has threatened to and intends to discontinue and abandon the operation of its said steamers, City of Mackinac II and City of Alpena II, entirely over said Detroit and Mackinac Route. That articles have recently appeared in the daily newspapers of Detroit purporting to be statements issued by the defendant to the effect that it will abandon its said service on said Mackinac Route and leave its said steamers, City of Mackinac II and City of Alpena II, idle. That such public statements of defendant have not been denied so far as plaintiff can ascertain,
6 and an article published in the Detroit Journal of January 7, 1921, is attached hereto as Exhibit A.

And plaintiff shows upon information and belief that it is the intention of defendant to so abandon said Mackinac Route, as aforesaid, and leave the territory served thereby without such transportation facilities.

(11) That, as plaintiff believes, it is necessary each spring before the opening of navigation for defendant to overhaul, repair and repaint said steamers in preparation for operation during the coming season. That defendant's season on said Detroit and Mackinac Route opens about May 1st, and plaintiff believes that at least two months are required for the necessary overhauling, repairing and repainting of said steamers. Plaintiff shows on information and belief that defendant, following out its expressed intention to

abandon said route, as aforesaid, does not intend to and will not give such directions and instructions to its employees as will result in the said steamers being made ready to commence said service as usual and at the customary time.

(12) And plaintiff shows and charges that it is defendant's duty, both at common law and under the acts of Congress hereinafter referred to, to provide and furnish such transportation of passengers and property during its navigation season for the year 1921 and thereafter, over said Detroit and Mackinac Route, as has been the usual custom and course of business of defendant in the past.

And plaintiff believes and charges that it is the determination and decision of defendant to abandon said service on the Detroit and Mackinac Route, and that such action of defendant is contrary to law and the acts of Congress, and in particular the acts known as the Interstate Commerce Act, as amended, as follows:

"Sec. 1. (As amended June 29, 1906; April 13, 1908; June 18, 1910; February 17, 1917; March 2, 1917; May 29, 1917; August 10, 1917, and February 28, 1920).

(1) That the provisions of this act shall apply to common carriers engaged in:

(*a*) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *

7 (3) * * * Wherever the word 'carrier' is used in this act it shall be held to mean 'common carrier.' * * * the term, 'transportation,' as used in this act shall include locomotive cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * (4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes, and providing for reasonable compensation to those entitled thereto, and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless, as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

(6) It is hereby made the duty of all common carriers subject

to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of
8 this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. * * *

Sec. 3. (As amended February 28, 1920).

(1) That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

(13) Plaintiff shows that about the 15th day of February, 1921, he filed a petition similar hereto with the Interstate Commerce Commission, reference to which is hereby made.

That said commission has ruled that it has no jurisdiction in the premises, which ruling plaintiff avers is in accordance with law, and plaintiff further shows that the relief herein prayed for must be afforded by the courts and not by an administrative body.

(14) That this bill of complaint is filed also on behalf of all other persons, firms, corporations or associations, either private or municipal, who may desire to intervene and be heard.

Wherefore, plaintiff being without remedy save in this court, prays:

(*a*) That defendant be required to appear and answer this bill in accordance with the rules and practices of this court.

9 (*b*) That this honorable court will order, adjudge and

decree that defendant, Detroit & Cleveland Navigation Company, furnish proper and suitable transportation for passengers and property during its navigation season of 1921, and thereafter over said Detroit and Mackinac Route, with rates and charges on a reasonable and fair basis, and to provide reasonable facilities for such transportation, and to make reasonable rules and regulations with regard to the operation of said steamers on said route; and in general to operate its said steamers on all said routes according to its custom and usage in the past.

(*c*) That defendant be temporarily and permanently enjoined by this court from discontinuing such transportation over said Detroit to Mackinac Route and the operation of its said vessels over said route, in accordance with its usual custom in the past.

(*d*) That defendant be further ordered and directed by the injunction of this court to make all necessary preparations in the way of repairs and repainting said steamers, City of Mackinac II and City of Alpena II, so that the same will be ready for such service on said Detroit and Mackinac Route at the opening of navigation in the year 1921, as has been the custom and usage of defendant in the past.

That plaintiff may have such other and further relief as may be necessary and proper in the premises. William Lucking. William Lucking, for Plaintiff.

STATE OF MICHIGAN,
County of Wayne, ss:

William Lucking being duly sworn, deposes and says that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters, he verily believes it to be true. William Lucking.

Subscribed and sworn to before me this 25th day of March, 1921. Lawrence M. Sprague, Notary Public, Wayne County, Michigan. My commission expires October 21, 1924. (Exhibit A—newspaper clipping.)

10 **MOTION TO DISMISS AND ANSWER TO THE BILL OF COMPLAINT.**

[Filed April 11, 1921.]

The defendant moves to dismiss the bill of complaint filed herein for the reason that by the said bill it appears:

(1) That this court is without jurisdiction to entertain the same.

(2) That the plaintiff is not entitled to the relief prayed therein, and, without waiving the benefit of said motion, for answer to said bill, defendant says:

1. It admits the allegations of paragraph 1 of said bill.
2. It admits the allegations of paragraph 2 of said bill, except that

Article I of its Articles of Association, therein purported to be quoted, is incorrectly quoted, and the words, "or other navigable waters," should be inserted before the words, "natural or artificial."

3. It admits the allegations contained in the second clause of paragraph 3 of said bill, except that it has not for more than a year last past operated a route between Toledo, Ohio, as alleged, and St. Ignace, Michigan. It has, however, operated a route between Detroit, Michigan, and St. Ignace, Michigan.

4. It admits, as alleged in paragraph 4 of said bill, that it has transacted business of an interstate character between he port of Detroit and the port of Buffalo, New York, and between the port of Detroit and the port of Cleveland, Ohio, and that it intends to continue to carry on such business during the current year.

It admits that it owns and operates steamers as alleged in said paragraph.

5. It denies the allegations contained in paragraph 5 of the bill, except as they are hereinafter admitted, and shows to the court that for some years last past it has filed with the Interstate Commerce Commission tariffs from which rates can be determined for transportation from points in trunk line territory lying east of Buffalo over its Buffalo division to Detroit, and points west of Detroit, and also to ports on its Mackinac Division, and from such ports and from points west of Detroit to Buffalo and to points east of Buffalo, and likewise from points south and west of Cleveland, Ohio, to
11 Detroit and points lying west and north of it, upon railroads, and also to ports lying on its Mackinac Division, and likewise from such ports and from such points on railroads north and west of Detroit to Cleveland and points lying south and west of Cleveland; that in the case of several rail carriers concurrences have been filed to said tariffs, but scarcely any traffic of any kind has moved under any of said tariffs; that under the proportional rates from trunk line territory to ports on the Mackinac Division no traffic has moved, nor has any under the tariffs from central traffic territory to ports on the Mackinac Division; that no tariff is in effect from points in central traffic territory by this company's route to points on the Duluth, South Shore & Atlantic Railroad, and that no tariff is in effect from trunk line territory by this company's lines to points on said Duluth, South Shore & Atlantic Railroad; that it has filed a tariff under which traffic might be carried from Cleveland, Ohio, and from Buffalo, New York, via its lines to points on the Duluth, South Shore & Atlantic Railroad, although very little, if any, traffic has been carried thereunder, but that no tariff is in effect from points on the Duluth, South Shore & Atlantic Railroad via this company's lines, either to Cleveland or to Buffalo, or to points beyond either of those cities. That defendant does not now intend to cancel such tariffs as have been filed as above set forth. That almost all of the business of the defendant is carried under its local tariffs covering transportation from port to port.

6. Defendant admits that for many years it has maintained a regular service between Cleveland, Ohio, and Detroit, Michigan, known as its Cleveland Division, and a route between Detroit, by

Detroit River, St. Clair River and Lake Huron, to St. Ignace, Michigan; that for some years it operated this division to the city of Toledo, Ohio, but that for several years past the cost of operating to Toledo exceeded the revenue derived from maintaining service to that city, and since the close of the season of 1919, it has not operated any steamers to said city, but has operated its Mackinac Division only between the cities of Detroit and St. Ignace, Michigan. It admits that it has carried and transported for hire many thousands of passengers over its Mackinac Division during the last ten years, but it denies that it has carried over that division hundreds
12 of thousands of tons of property and freight, and shows that in said period it has carried in the aggregate only about 130,000 tons of freight; that in the year 1917 it carried about 12,700 tons of freight in the aggregate on said division; in the year 1919, about 10,600 tons; in the year 1919, about 9,600 tons; and in the year 1920, less than 4,000 tons. That during said period of ten years it has never carried in any one year as many passengers as it carried in the year 1911; that in the year 1920 it carried less than half as many as it carried in the year 1911.

7. It admits the allegations contained in paragraph 7 of said bill, except the last allegation that it has made large net profits in the past from its transportation of passengers and freight over its route between Detroit and Mackinac. It shows that this allegation, made upon information and belief, is untrue; that for many years past it has not made large net profits on said division, but, on the contrary has, in recent years, operated said division at a loss; and that in each of the several years last past the cost of operating to St. Ignace and Mackinac has greatly exceeded the revenue derived from maintaining such service.

8. It admits that for several years it has operated the steamers, Mackinac II and the Alpena II, on the Mackinac Division above described. It denies that many of the ports and cities on Lake Huron were developed and built up in part by and depend to a certain extent upon the service rendered by said steamers. It denies that said steamers transported to said ports large amounts of freight and great numbers of passengers. It denies that it transports any considerable amount of freight or any considerable number of passengers between ports on Lake Huron and ports on defendant's routes in the state of Ohio and the state of New York and cities on the lines of railroad carriers beyond the ports in said last named states. It denies that large amounts of the products of said ports and the surrounding territory on said Mackinac Division are carried by it on said steamers during the navigation season, the total amount of freight carried by said steamers being as has been above set forth.

It shows that all of the ports to which said divisions has been operated along the shores of St. Clair River and Lake Huron for many years last past have been reached by railroad, except the port of Mackinac Island, which is reached by railroad and passen-
13 ger ferry; that the construction and operation of these railroad lines has very largely diminished the traffic carried by

this division to and from its ports of call; that the general business done at most of the ports of call on Lake Huron has been for several years last past diminishing, and that the tourist passenger business to and from Mackinac Island has diminished rather than increased during the last ten years.

9. Defendant is ignorant of the allegations contained in paragraph 9 of said bill, and leaves plaintiff to make such proofs thereof as his counsel may advise.

10. Defendant admits that it intends to discontinue and abandon the operation of its steamer, Mackinac II and its steamer Alpena II, over said Mackinac Division. It denies that its intention is based wholly upon its dissatisfaction with the so-called Seaman's Act. It denies that the abandonment of said division will leave the territory which its steamers have served without transportation facilities, and shows, as it has already alleged, that the ports at which it has heretofore touched are served by railroad. It further shows, that the enforcement of the terms of said Seaman's Act has added to its expenses incident to the operation of said line, and that it has been unable, without even greater loss by reason of the terms of said act, to operate its steamers on said route during the early part and during the latter part of the season of navigation. It shows that irrespective of the requirements of said act its operating expenses have been very largely increased during the last few years by the increase in the wages which it has been obliged to pay its officers and crews, and by the increase in the cost of fuel and supplies and food; that it has endeavored, by careful management and foresight, to continue the operation of said line without a large net loss, but owing to the increase in operating expenses, due in part to the operation of said Seaman's Act and in part to general business conditions resulting in such increases in wages, fuel costs, supplies and food costs, and the diminishing amount of traffic which it has been able to secure, its efforts have been unavailing and it has incurred net losses as above alleged.

11. It admits the allegations contained in paragraph 11 of said bill.

12. It denies the allegations contained in paragraph 12 of said bill.

14 13. It admits the allegations as to the filing and the dismissal of the petition contained in paragraph 13. It denies that the relief prayed by the plaintiff can be afforded by the courts. It denies that the plaintiff is entitled to any of the relief prayed in said bill or to any part thereof, and prays to be hence dismissed with its reasonable costs sustained. Detroit & Cleveland Navigation Company, by Arnold A. Schantz, its President. Angell, Turner & Dyer, Attorneys for Defendant.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 16th day of April, A. D. 1921, before me, the subscriber, a notary public in and for said county, personally appeared Arnold

A. Schantz, who made oath that he was the president of the Detroit & Cleveland Navigation Company, the above named defendant, and is authorized to make this answer in its behalf; that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the same is true. Bert C. Wilder, Notary Public, Wayne County, Michigan. My commission expires February 25, 1923.

OPINION ON MOTION TO DISMISS.

[Filed May 20, 1921.]

TUTTLE, *District Judge:* This cause is before the court on motion to dismiss the bill of complaint.

15 The material allegations of such bill are as follows: That plaintiff is a citizen and resident of the city of Detroit, Michigan, which is situated in this district; that the defendant is a Michigan corporation, having its principal office and place of business in said city, and that it was incorporated for the purpose of engaging in the business of maritime commerce; that said defendant is now, and has been for the last twenty years and more, during the navigation season, which includes the months of May, June, July, August and September, a common carrier for hire and engaged in interstate and intrastate transportation of passengers and property on Lake Huron and Lake Erie, and connecting waters; that in such capacity defendant has each season carried many passengers and much freight over well-known and defined routes, such as between Detroit, Michigan, and Buffalo, New York, between Detroit and Cleveland, Ohio and between Toledo, Ohio, and Detroit, Michigan, and thence through Lake Huron to and from various cities and ports in Michigan, on said Lake Huron, including Port Huron, Harbor Beach, Oscoda, Saginaw, and other places; that defendant will continue its interstate business, in its capacity as a common carrier for hire, during the navigation season of 1921 and thereafter; that defendant owns and operates in its said business several large steamers; that in the conduct of such business defendant has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and freight, partly by railroad and partly by water, from various ports on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers, in both interstate and intrastate commerce, by means of joint tariff rates and arrangements duly entered into in accordance with law and that defendant will continue so to do through the navigation season of the year 1921, and afterwards, and will derive a fair and reasonable return therefrom; that it has been the custom of defendant for several years past to file with the Interstate Commerce Commission, just before the opening, and just after the close, of its navigation season supplements to its tariffs announcing the establishment and the suspension, respectively, of said joint tariffs with said other railroad carriers; that one of the most popular and

largely traveled routes on the Great Lakes for years has been that
of the defendant from Cleveland and Toledo, Ohio, to and
16 from Detroit and the cities and ports on Lake Huron already
referred to; that in the conduct of its said business as a common carrier for hire, said defendant has made large profits on its capital investment therein, and in so doing, has availed itself of many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes; that for several years continuously defendant has operated certain of its steamers over its route, familiarly known as the Detroit & Mackinac Route, between Toledo, Ohio, and Detroit, Michigan, and thence northerly to and from said points on Lake Huron, and that many of the communities on said Lake Huron depend largely on the service rendered by said steamers during the navigation season of each year and transport therein large quantities of freight and great numbers of passengers to and from points in Ohio and New York, and to and from cities and destinations on the lines of said common carriers by railroad in said continuous carriage; that such freight is transported by defendant regularly, from year to year, during the navigation season, in said steamers, which have maintained a regular service of four trips per week in each direction on said Detroit and Mackinac Route, including four departures from said points on Lake Huron for Detroit and Toledo and way ports on said route, and four departures from Detroit and Toledo for said way ports on Lake Huron; that plaintiff in the past has, and in the future intends to, become a passenger on said steamers of defendant over said route, and has shipped property, including household furniture and supplies for his summer residence, on said steamers and desires to continue to do so during the navigation season of the year 1921 and thereafter; that plaintiff has been informed and believes that because of an alleged dissatisfaction on the part of defendant with one of the navigation laws of the United States, commonly referred to as the "Seaman's Act," defendant has threatened, and intends, to discontinue and abandon the operation of its said steamers over said Detroit and Mackinac Route; that it is necessary, before the opening of the navigation season, for the defendant to overhaul and repair said steamers in preparation for operation during the coming season, but that defendant, following its expressed intention to abandon said route,
will not prepare said steamers for their usual and customary
17 transportation service; that it is the duty of defendant, both
at common law and under the federal statutes, including the Intrastate Commerce Act, to provide and furnish such transportation during 1921 and thereafter, over said route, as has been its usual custom in the past; that plaintiff has heretofore filed a petition, similar to its present bill, with the Interstate Commerce Commission, but that said commission has ruled that it has no jurisdiction in the premises; and that this bill is filed also on behalf of all other persons and corporations who may desire to intervene herein.

The specific relief prayed includes an order requiring defendant

to furnish proper and suitable transportation for passengers and property during its navigation season of 1921, and thereafter, over said Detroit and Mackinac Route, according to its past custom; an injunction restraining the defendant from discontinuing such transportation over said route; and a mandatory injunction requiring the defendant to prepare its said steamers for service on said route during the ensuing season of navigation in accordance with its past custom.

The defendant has filed a motion to dismiss the bill of complaint, alleging that it appears from said bill (1) that this court is without jurisdiction in the premises and (2) that the plaintiff is not entitled to the relief prayed. These two objections will be considered in the order named, the allegations of fact contained in the bill being, of course, accepted as true for the purposes of the motion to dismiss.

1. Has this court jurisdiction to entertain the bill and to grant any of the relief prayed? Diversity of citizenship is not involved and the necessary jurisdiction must depend upon the presence of a federal question. Is this, then, a case arising under the constitution or laws of the United States?

As already noted, one of the contentions of the plaintiff is that the proposed discontinuance by the defendant of the operation of its steamers over the route referred to would be a violation of the Interstate Commerce Act, certain provisions of which, claimed by plaintiff to be applicable, are quoted in its bill.

It is, of course, well settled that if the result of a suit depends upon the construction and effect of a federal statute, such a suit arises under the laws of the United States, within the meaning of the constitutional provision conferring jurisdiction upon the
18 federal courts in such cases. Louisville & Nashville R. R. Co. v. Rice, 247 U. S., 201, 62, L. Ed., 1071.

It is equally well settled that where the plaintiff in a case plants a claim for relief upon a federal law and such claim is apparently made in good faith, is based upon real and substantial grounds, and is not so unreasonable and wholly destitute of merit as to be merely frivolous and colorable, such a case presents a federal question within the general jurisdiction of the federal court, irrespective of the presence or absence of diversity of citizenship. Boston Store v. American Graphophone Co., 246 U. S., 8, 62, L. Ed. 551.

Plaintiff invokes the Interstate Commerce Act as a basis for its claim to relief. The first subdivision of the first section of said Interstate Commerce Act (the act of February 4, 1887, chapter 104, 24 Stats. at Large, 379, as amended) provides that the provisions of such act shall apply to common carriers engaged in "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment." The fourth subdivision of the same section provides that "It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares,

and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto. "Considering, then, these provisions of the statute in connection with the allegations in the bill of complaint to the effect that in the conduct of its business as a common carrier the defendant "has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers," and in view of the allegations in the bill as to the interstate character of the commerce carried by the defendant over its various routes, I cannot avoid the conclusion that plaintiff has stated a claim for relief based upon a federal
19 law, and that such claim is not so unsubstantial and unreasonable as to be frivolous and merely colorable. The bill raises, in my opinion, a real and substantial federal question which it is the duty of this court to consider and decide. It follows that the objection based upon the supposed lack of jurisdiction of the court to entertain this suit must be overruled.

2. Coming, then, to consider the merits of the case, as shown by the bill, the question presented is whether a common carrier by water, after establishing several regular routes for the transportation of passengers and freight by vessel, in both interstate and intrastate commerce, is under any legal obligation to continue to operate its vessels in such transportation over all of such routes, in the absence of a franchise or other arrangement with the state imposing upon it such an obligation.

Plaintiff contends that the duty to continue such operation is created both by the Interstate Commerce Act and also by the common law. If such duty does arise from either of the sources mentioned, plaintiff is entitled to the relief prayed in this court, since the federal jurisdiction, having been invoked upon real and substantial grounds of federal law, extends to the determination of all questions involved in the case, whether resting upon federal or state law, and irrespective of the disposition made of the federal question involved. Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499, 61 L. Ed. 280.

As the federal statute thus invoked must be construed in the light of the circumstances existing and known to Congress at the time of its enactment, including the state of the common law then in force, it will be more convenient to first consider the extent of the duty of a common carrier, with reference to the subject under consideration, at the common law. It is elementary that it is the duty of a common carrier, even in the absence of any statute to that effect, as incidental to the occupation in which it is engaged, to receive and carry freight and passengers, upon reasonable request therefor, without discriminations and on reasonable rates and charges. Winona and St. Peter Railroad Co. v. Blake, 94 U. S., 180, 24, L. Ed. 99; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S., 70,

56, L. Ed. 355; Chicago, Rock Island & Pacific Railway Co. v. Lawton Refining Co., 253 Fed., 705; 10 Corpus Juris, 65.

No authority, however, has been called to my attention, and I have discovered none, to the effect that a common carrier such as the defendant here, not enjoying any public franchises or exercising any public powers or privileges is bound, after commencing to operate vessels over a certain route, to continue such operation if it finds it desirable to discontinue and abandon the same.

It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as for example, the power of eminent domain. Enjoying, therefore, as it does, these special and public powers, such railroad company is subject to correspondingly special and public duties, among which is the obligation, arising by operation of law from the acceptance of its rights and franchises, and continuing during its enjoyment thereof, to continue to operate as a common carrier over the lines and routes established by it for that purpose, such obligation arising out of, and depending upon, the unusual and peculiar rights and privileges so exercised by it. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, 54, L. Ed. 472; Chesapeake & Ohio Railway Co. v. Public Service Commission, 242 U. S., 603, 61, L. Ed. 520; 4 Ruling Case Law, 672; 22 Ruling Case Law, 750.

The reasons, however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain. It has no private right of way or special facilities for acquiring means of access by its vessels to docks or wharves, but must use the open sea as its highway and depend, for the proper maintenance of its vessel and equipment, upon such arrangements as it may be able to make by private contract, like any other private citizen. In the eyes of the law it occupies no different position than that of a common carrier operating taxicabs or other vehicles upon land, and it is under no greater obligation than is the common carrier last mentioned, so far as the continued operation of its lines is concerned. It has never been supposed, and could not seriously be contended, that every person who engages in the business of transportation as a common carrier is obliged to continue in such business indefinitely and may be restrained by injunction from abandoning such of its routes as it may wish to discontinue.

The mere fact, then, that the defendant is a common carrier does not subject it to the duty to continue the operation of its vessels over

any or all of its routes of transportation. As, therefore, it does not appear that the defendant is a public or quasi-public corporation, or exercises any powers or rights from which flow the duty in question, I am unable to find in the common law any basis or warrant for the coercive order sought, and I am clearly of the opinion that in the absence of some statutory provision applicable the plaintiff is not entitled to the relief prayed.

Is there, then, any statutory provision which prevents the defendant from exercising the right, which it otherwise had, to withdraw from the business in which it has been engaged, to the extent which it deems necessary or desirable? Plaintiff invokes the fourth subdivision of the first section of the Interstate Commerce Act, hereinbefore quoted, to the effect that "it shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor." This language was imported into the statute by the Hepburn Act (the act of June 29, 1906) and is merely declaratory of the common law rule governing the duty of common carriers. Menasha Paper Company v. Chicago & Northwestern Railway Co., 241 U. S., 55, 60 L. Ed., 885; 10 Corpus Juris, 66. It is to be observed that the provision in question applies to common carriers subject to the act "engaged in the transportation" of passengers or property, and the obligation referred to is the duty "to provide and furnish such transportation upon reasonable request therefor." It is clear that the meaning and effect of this language is that a common carrier, subject to the act, which is actually engaged in transporting passengers or freight must receive and carry such passengers or freight as may be offered to it, without discrimi-
22 nation, and in the performance of the duty under which it rests so long as it holds itself out as a carrier of such passengers or freight, to provide the necessary facilities and equipment for "such transportation," provided that "reasonable request" is made therefor. There is nothing in this or any other section of the statute which prevents a common carrier, such as the defendant, from disengaging itself from the transportation of passengers or freight between particular points, or which makes it the duty of such a carrier to furnish such transportation if it is not actually "engaged in" the business of furnishing any transportation between such points. If in the present case the grievance of the plaintiff were that the defendant, while engaged in transporting passengers and freight over its so-called Detroit and Mackinac Route, refused or failed to furnish adequate facilities or equipment for such transportation, the claim of plaintiff for proper relief from such a situation on the ground that the defendant was violating a duty created or expressed in the language just quoted would not be without force. The situation, however, actually presented is quite different. To the extent that defendant discontinues the furnishing of any transportation over one of its routes, to that extent it ceases to be engaged as a common carrier in transportation or subject to the obligation referred to in this portion of the statute. Considering the right which a carrier such as defendant has at common law to abandon entirely one or

more routes for the operation of its vessels, an intention on the part of Congress to take away such right and impose on such a carrier the duty resting upon a carrier by railroad in this respect, cannot be deduced from language which falls so far short of expressing such an intention as does the provision now under consideration. It would have been easy to have expressed such a purpose, and it must be assumed that if Congress had intended to create such an obligation, in derogation of the common law rule applicable, it would have done so in appropriate terms.

The conclusion, moreover, that it was not intended by the Interstate Commerce Act to impose upon such a carrier the obligation mentioned, is strengthened and confirmed by the provision in the eighteenth subdivision of section 1 of the act to the effect that "No carrier by railroad, subject to this act, shall abandon all or any portion of a line of railroad, or the operation thereof, unless and
23–26 until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." In this part of the statute, Congress has legislated upon the subject of the abandonment of existing lines of transportation and in so doing it has expressly imposed the limitations created, not upon "every common carrier subject to this act," as in other sections and clauses of the statute, but only upon a "carrier by railroad subject to this act." Expressio unius exclusio alterius. The express imposition of this obligation upon common carriers by railroad evidences, in my opinion, an intention to exclude from the burden thereof every other common carrier. But, however, this may be, I am unable to discover in any of the comprehensive terms of the statute invoked any language indicating a purpose to subject a carrier such as the defendant to the duty which plaintiff seeks to have this court enforce. Nor do I know of any statutory provision creating such an application or any decision applying or announcing such a rule, none of the cases cited by plaintiff involving a proposed discontinuance or abandonment of a route of transportation by such a carrier.

For the reasons stated, it results that the motion to dismiss the bill must be granted, and an order will be entered accordingly. Arthur J. Tuttle, District Judge. Detroit, Michigan, May 20, 1921.

27 **MEMORANDUM ON MOTION FOR REHEARING.**

[Filed June 8, 1921]

Tuttle, district judge. Plaintiff has filed a motion for a rehearing and in support thereof has submitted a brief which has received careful consideration.

Counsel for plaintiff lays considerable stress upon the words, "engaged in the transportation of passengers or property," quoted in my former opinion from the Interstate Commerce Act. The addition by the Transportation Act of February 28, 1920, of these words to the sentence as it previously stood did not increase or other-

wise alter the nature and extent of the duty imposed upon the common carriers to which it applied. I am well satisfied that this provision of the Interstate Commerce Act relied on by plaintiff did not, before the 1920 amendment, as it does not now, prevent a carrier such as defendant from discontinuing one or more of its routes.

Counsel cites and relies on Section 4 of Act 300 of Michigan Public Acts of 1909, providing that "every common carrier is hereby required to furnish reasonably adequate service and facilities and shall provide and furnish transportation of passengers and property upon reasonable request therefor." In view of the language of Section 3 of said act, defining the term, "common carrier," as used in said act, as meaning and referring to railroad companies, express companies, and other carriers wholly by railroad, or partly by rail and partly by water, this statute has no application to the defendant company. Moreover, even if so applied, the provision cited is substantially the same, in scope, and effect, as the clause of the Interstate Commerce Act already mentioned and falls equally short of imposing upon the defendant carrier the obligation to which plaintiff claims that it is subject.

Furthermore, Act 56 of the Michigan Public Acts of 1919, entitled, "An act to regulate the discontinuance of service by certain common carriers," etc., prohibiting the abandonment by any railroad common carrier of any of its lines without the permission of the Michigan Railroad Commission, indicates on the part of the Michigan Legislature, by confining its application to such carriers, the same intention to leave other carriers free to discontinue service on
28 their routes, as is indicated on the part of Congress by the eighteenth subdivision of the first section of the interstate commerce act referred to in my former opinion in this case.

Plaintiff again invokes the decision in the case of Chesapeake & Ohio Railway Company v. Public Service Commission, cited in the previous opinion of this court. That case, however, involved a railroad company and an examination of the opinions therein, both of the state court (from which counsel quotes in his brief) and of the United States supreme court, clearly shows that the rule there applied to the railroad in question is not applicable to a private common carrier, such as the defendant in the instant case.

The motion for a rehearing and the brief in support thereof have been closely examined and carefully considered, but I find therein no argument substantially different from those previously advanced and no reason for changing or modifying any of the views reached and expressed by me in my opinion already filed. Further reflection serves merely to strengthen my former conviction of the correctness of such conclusions.

The motion is denied. Arthur J. Tuttle, District Judge. Detroit, Michigan, June 8, 1921.

29 *Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.*

DECREE.

[Filed Nov. 7, 1922.]

Appeal from the District Court of the United States for the Eastern District of Michigan. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, it is now here ordered adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby affirmed with costs.

30 [Title omitted.]

OPINION.

(Filed Nov. 7, 1922.) 284 F. 487

Submitted March 10, 1922. Decided November 7, 1922.

Before Knappen, Denison, and Donahue, Circuit Judges.

The parties below were aligned as here. The appeal is from an order dismissing plaintiff's bill in equity. The following excerpt from the opinion of District Judge Tuttle (273 Fed. 577) succinctly and sufficiently states the case as presented by the bill and the motion to dismiss.

"This cause is before the court on motion to dismiss the bill of complaint. The material allegations of such bill are as follows:

That plaintiff is a citizen and resident of the city of Detroit, Mich., which is situated in this district; that the defendant is a Michigan corporation, having its principal office and place of business in said city, and that it was incorporated for the purpose of engaging in the business of maritime commerce; that said defendant is now, and has been for the last 20 years and more, during the navigation season, which includes the months of May, June, July, August, and September, a common carrier for hire, and engaged in interstate and intrastate transportation of passengers and property on Lake
31 Huron and Lake Erie and connecting waters; that in such capacity defendant has each season carried many passengers and much freight over well-known and defined routes, such as between Detroit, Mich., and Buffalo, New York, between Detroit and Cleveland, Ohio, and between Toledo, Ohio, and Detroit, Mich., and thence through Lake Huron to and from various cities and ports in Michigan, on said Lake Huron, including Port Huron, Harbor Beach, Oscoda, St. Ignace, and other places; that defendant will continue its interstate business, in its capacity as a common carrier for hire, during the navigation season of 1921 and thereafter; that

defendant owns and operates in its said business several large steamers; that in the conduct of such business defendant has, by arrangement with other common carriers by railroad been engaged in the continuous transportation of passengers and freight, partly by railroad and partly by water, from various ports on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers, in both interstate and intrastate commerce, by means of joint tariff rates and arrangements duly entered into in accordance with law, and that defendant will continue so to do through the navigation season of the year 1921 and afterwards, and will derive a fair and reasonable return therefrom; that it has been the custom of defendant for several years past to file with the Interstate Commerce Commission, just before the opening and just after the close of its navigation season, supplements to its tariffs announcing the establishment and the suspension respectively, of said joint tariffs with said other railroad carriers; that one of the most popular and largely traveled routes on the Great Lakes for years has been that of the defendant from Cleveland and Toledo, Ohio, to and from Detroit and the cities and ports on Lake Huron already referred to; that in the conduct of its said business as a common carrier for hire said defendant has made large profits on its capital investment therein, and in so doing has availed itself of many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes; that for several years continuously defendant has operated certain of its steamers over its route, familiarly known as the 'Detroit and Mackinac Route,' between Toledo, Ohio, and Detroit, Mich., and thence northerly to and from said points on Lake Huron, and that many of the communities on said Lake Huron depend largely on the service rendered by said steamers during the navigation season of each year,
32 and transport therein large quantities of freight and great numbers of passengers to and from points in Ohio and New York, and to and from cities and destinations on the lines of said commen carriers by railroad in said continuous carriage; that such freight is transported by defendant regularly from year to year, during the navigation season, in said steamers, which have maintained a regular service of four trips per week in each direction on said Detroit and Mackinac route, including four departures from said points on Lake Huron for Detroit and Toledo and way ports on said route, and four departures from Detroit and Toledo for said way ports on Lake Huron; that plaintiff in the past has, and in the future intends to, become a passenger on said steamers of defendant over said route, and has shipped property including household furniture and supplies for his summer residence, on said steamers, and desires to continue to do so during the navigation season of the year 1921, and thereafter; that plaintiff has been informed and believes that, because of an alleged dissatisfaction on the part of defendant with one of the navigation laws of the United States, commonly referred to as the 'Seamen's Act' (Act March 4, 1915, c. 153, 38 Stat. 1164), defendant has threatened, and intends, to discontinue and abandon the operation of its said steamers over said Detroit and

Mackinac route; that it is necessarily, before the opening of the navigation season, for the defendant to overhaul and repair said steamers in preparation for operation during the coming season, but that defendant, following its expressed intention to abandon said route, will not prepare said steamers for their usual and customary transportation service; that it is the duty of defendant, both at common law and under the federal statutes, including the Interstate Commerce Act, to provide and furnish such transportation during 1921 and thereafter, over said route, as has been its usual custom in the past; that plaintiff has heretofore filed a petition, similar to its present bill, with the Interstate Commerce Commission, but that said Commission has ruled that it has no jurisdiction in the premises; and that this bill is filed also on behalf of all other persons and corporations who may desire to intervene herein.

The specific relief prayed includes an order requiring defendant to furnish proper and suitable transportation for passengers and property during its navigation season of 1921 and thereafter over said Detroit and Mackinac route according to its past custom, an injunction restraining the defendant from discontinuing such transportation over said route, and a mandatory injunction
33 requiring the defendant to prepare its said steamers for service on said route during the ensuing season of navigation in accordance with its past custom.

The defendant has filed a motion to dismiss the bill of complaint, alleging that it appears from said bill (1) that this court is without jurisdiction in the premises; and (2) that the plaintiff is not entitled to the relief prayed. These two objections will be considered in the order named; the allegations of fact contained in the bill being, of course, accepted as true for the purposes of the motion to dismiss."

The jurisdiction of the district court, as a court of the United States, to entertain the bill was sustained on the ground that plaintiff's contention that relief was affordable under the Interstate Commerce Act was not so unsubstantial and unreasonable as to be frivolous and merely colorable. Upon the merits, however, the district court, while recognizing that a common carrier, while engaged in transporting freight and passengers over a given route, owes a duty, even in the absence of statute to that effect and as incidental to the occupation in which it is engaged, to receive and carry freight and passengers upon reasonable request therefor, without discrimination and on reasonable rates and charges; and while also recognizing that railroad companies are not permitted to discontinue at will the rendition of the transportation service for the performance of which they have been endowed with special privileges and powers,—was of opinion that navigation companies such as defendant are not forbidden, either by common law or by statute, to withdraw from such transportation, in whole or in part, by abandoning or suspending operation over all or any of their lines or routes. In this court, intervention, to the extent of filing briefs has been made by or on behalf of certain cities on the discontinued line, which cities it is claimed are injuriously affected by such discontinuance. There is

no averment in the bill of complaint that the City of Detroit, or any of the cities intervening in this action, are entirely without railroad service; or that plaintiff is without public service by water or by rail and water between Detroit and Mackinac Island during the navigation season.

Knappen, Circuit Judge: In our opinion the court below rightly maintained jurisdiction, as a court of the United States, over the case presented by the bill, and for the reasons assigned by the district judge. Louisville & N. Ry. Co. v. Rice, 247 U. S. 201, 203; 34 Greene v. Louisville & I. Ry. Co., 244 U. S. 499. We also assume, for the purpose of this opinion, that the bill does not show a lack of sufficient interest in the party complaining, especially as it is filed in the interest not only of plaintiff, but of others similarly situated.

Upon the merits, the case lies within narrow compass. It is undisputed that defendant was incorporated under the general Michigan statute of 1867,[1] which authorized such incorporation "for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith." This statute was superseded by the general incorporation statute of Michigan of June 18, 1903,[2] which includes corporations "for engaging in maritime commerce or navigation," and which continued in force all such corporations previously organized. Defendant's articles of incorporation, which constitute its charter, contain no designation or mention of the route or routes over which navigation was intended, nor did either of such incorporation statutes require such designation. Defendant is indisputably a common carrier by water, and as such is engaged in domestic and interstate commerce, and has been so engaged for more then 20 years. Being engaged in the operation of a public utility, it was and is subject to an enforceable obligation (and, we assume, even in the absence of statute or special contract, by franchise or otherwise) to supply on demand reasonable service in the transportation of passengers and freight over such lines as are at the time operated by it. No question of reasonableness of service as to any route under operation by defendant when this suit was instituted is here presented. The sole question before us is whether, either by common law or by statute (federal or state) defendant is forbidden to cease or suspend navigation over a given route over which it has previously operated,—because such cessation entails inconvenience or hardship upon the public previously served by such utility.

In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we

[1] Act No. 24, approved Feb. 21, 1867, Chap. 181, Mich. Comp. Laws, 1897.
[2] P. A. Mich. 1903, Act No. 232; Mich. Comp. Laws, 1915, C. 175.

35 are advised, had any relation to navigation companies.[3] So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as
36 eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock

[3] Prominent among the cases relied on by plaintiff or intervenors are Central Transportation Co. v. Pullman's Car Co., 139 U. S., 24, where it was held that a lease by the plaintiff (which was chartered for "the transportation of passengers in railroad cars constructed and to be owned by said company") of all its cars to defendant for 99 years, with agreement not to engage in the business of manufacturing, using or hiring cars during the life of the contract, was ultra vires, the court saying (pp. 50-51) that "the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain." (Plainly, this decision is not opposed to the conclusion we have announced above.) Interstate Commerce Commission v. Transit Co., 224 U. S. 194, where it was held that carriers partly by railroad and partly by water, under a common arrangement for a continuous carriage, are within the Interstate Commerce Act, and so subject to the provisions of the act authorizing the commission to require a system of accounting. (Neither this nor either of the following decisions cited in this note throw light upon the common law rule.) Chesapeake & Ohio Railway Co. v. Public Service Commisson, 242 U. S. 603, where it was held, following the Supreme Court of Appeals of West Virginia, that a law of that state which declared that "railroads" shall be public highways "free to all persons for the transportation of their persons and property" embraces a branch line constructed and operated under it, and imposes on the carrier with respect to such line a continuing franchise obligation to transport passengers as well as freight; and that such obligation may be enforced by state action, although the carrier has long operated the branch in freight traffic only and never in any other. Grand Trunk Ry. Co. v. Michigan Ry. Commission, 231 U. S. 457, where an order of the State Commission requiring certain railroads doing an interstate business to use their tracks within the limits of a city for the interchange of intrastate traffic was sustained as being within the regulating power of the commission, the court remarking (p. 473) that to certain controlling conditions previously mentioned there must be added: "the fact that the railroad itself for a long period of time had recognized the situation, and had applied the tracks to uses of transportation in the proper sense as dstinguished from mere terminal service, a use which was only abandoned or sought to be abandoned when authority was exercised to prevent unreasonable and to secure reasonable charges for the services." Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, where it was held that in determining whether a corporation is or is not a common carrier the important thing is what it actually does, and not what its charter says it may do. Gasser v. Garden Bay R. R. Co., 205 Mich. 5, where it was held that a railway company, having been incorporated under the laws of the state as a common carrier, and having secured permission from the Railroad Commission to issue stock, and having entered upon the operation of its line under an implied duty to the public to continue its operation as a public service corporation, could not thereafter arbitrarily abandon operations permanently, discontinue the assumed service and dismantle the road, without the consent of the state through its constituted authority. The syllabus in Hocking Valley R. R. Co. v. The Public Utilities Commission of Ohio, 92 O. St. 9, which represents the decision of that court, contains nothing specially pertinent to the proposition we are considering.

and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant.

It is not apparent that the situation is at all changed by the fact that defendant, in common with navigation companies generally, is by the Michigan statute (P. A. Mich. 1911, No. 70, April 13, 1911) subject to a tonnage tax in lieu of general property taxes—in practice much larger than the tonnage taxes; nor by the fact that defendant has in previous years found the Mackinac line profitable, and that the operation of defendant's lines, taken as a whole, is profitable.

It remains to consider whether the power asserted by plaintiff has been conferred upon the courts by statute. We think it clear that there is no such federal statute. True, by sub-section 1 (*a*) of the Interstate Commerce Act, as amended (Act Feb. 28, 1920, 41 Stat. C. 91, p. 456; as amended by Act June 5, 1920, C. 235, 41 Stat. 945), the act is made applicable to transportation "partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;" and, by sub-section 1(*b*), to the transportation of commodities generally "partly by railroad or by water;" and, by sub-section 3, transportation is made to include "vessels;" and, by sub-section 4, it is made the duty of every common carrier subject to the act, engaged in the transportation of passengers or property, to furnish such transportation upon reasonable request therefor. We agree with the district court that the addition, under the amendment of 1920, of the words "engaged in the transportation of passengers or property" has not increased or altered the nature or extent of the duty imposed upon the common carriers to which it applied. Not only do we find in these provisions of the Interstate Commerce Act no inhibition upon a carrier by water to suspend or discontinue its route or routes in whole or in part (defendant is not a carrier by rail, except in the sense that it carries by water under joint tariffs, rates and arrangements with rail carriers), but any implication of such inhibition is to our minds plainly repelled by sub-
section 18 of the amended act, which provides that "no
37 carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." This inhibition, directed alone to the "carrier by railroad," indicates, we think, a legislative intent to exclude from its effect carriers by water. We have no doubt the Interstate Commerce Commission rightly disclaimed jurisdiction to act in the premises upon plaintiff's request.

We think it equally clear that no Michigan statute confers upon the courts any authority to restrain the suspension or discontinuance of service over the route in question. The statute of 1919 (P. A. Mich. 1919, No. 56, April 10, 1919) forbids a common carrier by

railroad to "abandon its main line of track, or tracks, or any portion thereof, or remove or close any of its main line track, or tracks, except for the purpose of repairing the same or altering the line of the track, except by permission of the Michigan Railroad Commission in accordance with the provisions hereof." It is significant that this statute contains no mention whatever of common carriers by water, and discloses, we think, an express legislative intent not to include them.[4] Since the instant suit was brought the legislature of Michigan has passed an act "to regulate the service, rates, fares and charges of carriers by water within this state," which act provides for investigation by the State Public Utilities Commission[5] of any complaint "against any rate, fare, charge or tariff of any carrier by water within this state, or against any rule, regulation or service of such carrier, or against the neglect, failure, or refusal of any such carrier to * * * observe or perform any rate * * * rule * * * or service," with authority to regulate the performance or observance of such "rate, fare, charge or tariff, and any rule, regulation or service," with power to "prescribe the same to
38 be observed by such carrier" (P. A. Mich. 1921, No. 246, May 18, 1921). It is matter of public information that the Michigan Public Utilities Commission has held that it has jurisdiction over some features, at least, of applications to compel resumption of service on the line in question. It scarcely need be said that the existence of such power in the Commission confers no authority upon the courts to furnish the relief asked by the bill in this cause.

The order of the district court dismissing the bill of complaint is affirmed.

39 **CLAIM OF APPEAL.**

[Filed Jan. 4, 1923.]

Now comes the plaintiff and appellant William Lucking, and claims the benefit of an appeal to the Supreme Court of the United States from the decree of the Circuit Court of Appeals of the United States for the Sixth Circuit, entered therein on the 7th day of Novem-

[4] In view of this situation there is little, if any, significance in the fact that by the earlier statute creating the Michigan Railroad Commisson (P. A. Mich. 1909, Act 300; 2 C. L. Mich. 1915, C 155, secs. 8109 et seq.) the term "common carriers" is made to include those engaged in "the transportation of passengers and property wholly by rail or partly by rail and partly by water;" that the term "transportation" includes "all instrumentalities and facilities of shipment" (sec. 8111), and that every common carrier is required to furnish "reasonably adequate services and facilities" and to "provide and furnish transportation of passengers and property upon reasonable requests therefor" (sec. 8112).

[5] The Michigan Public Utilities Commission was created by Act No. 419, May 15, 1919, and thus subsequent to the act before referred to, relating to the abandonment by a common carrier by railroad of any of its tracks except by permission of the Michigan Railroad Commission. The latter commission was abolished by the act creating the Michigan Public Utilities Commission.

ber, A. D. 1922; and thereupon the appellant files herewith his assignment of errors on appeal and prays this court to allow this appeal and approve the bond filed herewith.

Dated December 29th, 1922. Wm. Lucking.

(Lodged with me this 3rd day of January 1923. Loyal E. Knappen, Circuit Judge).

40 **ASSIGNMENTS OF ERROR.**

[Filed Jan. 4, 1923.]

Now comes the appellant in the above entitled cause, William Lucking, and files his assignments of error in the above cause, and says that in the giving of the decree herein of the United States Circuit Court of Appeals for the Sixth Circuit, there is manifest error in this, towit:

(1) That the court erred in dismissing the bill of complaint, as amended.

(2) That the court erred in failing and refusing to grant the relief prayed for by the bill of complaint, as amended.

(3) That the court erred in not holding that defendant was a common carrier of passengers and freight on its Mackinac
41 route, and as such was charged with the duty of affording reasonable and adequate service and facilities to the plaintiff and the public.

(4) That the court erred in not holding that defendant, since it derived a profit on its whole business, was obliged to give and afford reasonable and adequate service and transportation facilities for the transportation of freight and passengers over its Mackinac Route.

(5) That the court erred in not holding that the defendant was under such duty to afford and render adequate and reasonable service and transportation facilities at the common law.

(6) That the court erred in not holding that the defendant was under such duty by reason and virtue of the Statutes of the State of Michigan.

(7) That the court erred in not holding that the defendant was under such duty by reason and virtue of the Acts of Congress known as the Interstate Commerce Act and amendments thereto.

(8) That the court erred in not holding that the defendant was as much a common carrier and under the same duties to furnish transportation facilities and service as a common carrier by railroad.

(9) That the court erred in not directing a hearing of
42 the case in the lower court on the merits and the taking of full proofs to determine the public necessity for the operation of defendant's steamers on its Mackinac Route and whether a reasonable and adequate return would be afforded defendant for such service. Wm. Lucking, Plaintiff and Appellant.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

BOND ON APPEAL.

[Filed Jan. 4, 1923.]

Know all men by these presents, that we, William Lucking, as principal, and Harold W. Hanlon, as surety, are held and firmly bound unto the Detroit & Cleveland Navigation Company, a corporation, in the full sum of three hundred dollars, to be paid to the said company its successors and assigns; to which payment well and truly to be made the said principal and the said surety bind themselves, their heirs, administrators and assigns, jointly and severally by these presents.

Sealed and dated this 29th day of December one thousand
43 nine hundred and twenty-two.

Whereas, on November 6, 1922, at a session of this court in a suit pending in said court, between the said William Lucking, plaintiff, and Detroit & Cleveland Navigation Company, a corporation, defendant, a decree was rendered against the said plaintiff and in favor of said defendant, and the said plaintiff, having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the decree in the said suit, and a citation directed to the said defendant being about to be issued, citing and admonishing them to be and appear at a session of the said Supreme Court of the United States to be held at Washington, D. C.

Now, the condition of the obligation is such, that if the said William Lucking shall prosecute his said appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation is to be void; otherwise to remain in full force and effect. Wm. Lucking. Harold W. Hanlon.

This bond is approved as to form, amount and sufficiency of sure-
ties. Loyal E. Knappen, Circuit Judge.
44 Dated this 3rd day of January, 1923.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

ORDER ALLOWING APPEAL AND APPROVING BOND.

[Filed Jan. 4, 1923.]

On reading and filing appellant's claim of appeal to the Supreme Court of the United States, with assignment of errors and bond on appeal in behalf of the above defendant it is hereby

Ordered that the said bond for costs on appeal be and it is hereby approved, and it is

Further ordered that the said appeal be and the same is hereby allowed.

Dated this 3rd of January, 1923. Loyal E. Knappen, U. S. Circuit Judge.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

45 [Title omitted.]

CITATION AND SERVICE.

[Filed Jan. 18, 1923.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Detroit & Cleveland Navigation Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal duly allowed in the cause heretofore pending in the said The United States Circuit Court of Appeals for the Sixth Circuit wherein William Lucking is the plaintiff and appellant and you, the said Detroit & Cleveland Navigation Company, are the defendant and appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected and full and speedy justice done to the parties in that behalf.

Witness my hand and seal at the City of Grand Rapids, State of Michigan, this 3rd day of January, 1923. Loyal E. Knappen, Judge of the United States Circuit Court of Appeals for the Sixth Circuit. Attest: Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

46 Due and timely service of the within citation on appeal in the within named cause is hereby acknowledged on behalf of the Detroit & Cleveland Navigation Company, the within named defendant and appellee.

Detroit, Michigan, January 11th, 1923. Angell, Turner & Dyer, Attorneys for Defendant & Appellee.

47 [Endorsement omitted.]

48 **PRAECIPE FOR RECORD.**

[Filed Jan. 30, 1923.]

The undersigned plaintiff desires the following pleadings and papers printed in the printed record on appeal in this cause, namely:

(1) Bill of Complaint.
(2) Defendant's Motion to dismiss Bill of Complaint.
(3) Opinions of District Court (2).
(4) Opinion of Court of Appeals.
(5) Decree of United States Circuit Court of Appeals.
(6) Claim of Appeal to Supreme Court.
(7) Bond on Appeal.
(8) Assignments of Error.

(9) Order allowing appeal and approving bond.
(10) Citation. Wm. Lucking.

The Detroit & Cleveland Navigation Company, Defendant and Appellee, desires no further portions of the record to be included in the transcript of the record on appeal to be returned to the Supreme Court of the United States. Angell, Turner & Dyer, Attorneys for Defendant and Appellee.

49 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in accordance with præcipe filed in the case of William Lucking vs. Detroit & Cleveland Navigation Company, No. 3625, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this — day of January, A. D. 1923. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.] Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, by E. C. Klein, Deputy Clerk.

Endorsed on cover: File No. 29,376. U. S. Circuit Court Appeals, 6th Circuit. Term No. 826. William Lucking, appellant, vs. Detroit and Cleveland Navigation Company. Filed February 2d, 1923. File No. 29,376.